stock, whose position as a passive party was essential to winning the permit (Malrite). That transfer of control was approved by the FCC by letter dated October 16, 1986, 1 FCC Rcd. 293, whereupon, on October 31, 1986, Mr. Maltz, head of the Malrite group, became President and CEO of the station. JA 436-45.

The FCC relies on its recent rule requiring the filing of a certification that integration is in place on the first anniversary of commencement of station operation, 7 FCC Rcd. at 4568-69 (¶16 and n. 11). The Debra Carrigans, the Hubert Paynes and the Malrites will have no problem with that rule. They will file an application to sell or transfer control of the station on virtually the same day they file the certification. In our brief in Bechtel v. FCC, JA 227, we stated that to our knowledge, the practice of the FCC's staff was to permit free alienability of a station won in a comparative hearing at the end of one year. At oral argument before the Court in Bechtel v. FCC, Commission counsel did not deny this. Such alienability is contemplated under the FCC's current rulemaking notice, 7 FCC Rcd. at 2668, 2672 (¶28, n. 12), and is not denied in the first or second remand decisions. Indeed, in the first remand decision, 7 FCC Rcd. 4569 (n. 11), the FCC supports a one-year cutoff on the basis of its rule for low power television stations, an auxiliary class of broadcast facility for which permittees are selected by lottery.

This is a stark admission on the government's part that its integration policy has become bankrupt. When that policy was articulated in 1965, the Commission stated that it expected the

ownership integration to be, using its word, permanent. 1 F.C.C.2d at 393 (1965). We are talking here about the nation's full service radio and television broadcast stations, not auxiliary facilities for which lotteries have been deemed an appropriate selection mechanism. While the word permanent must be read with some ultimate limitation, for sure it denotes an intention that integration be a long-term commitment with a significant and lasting impact on the public interest. If not, if stations may be sold at the end of only one year, why bother?

The Commission's Review Board has made some effort to adhere to the notion of a long-term commitment. E.g., Tele-Broadcasters of California, Inc., 58 Rad. Reg.2d (P&F) 223, 232, n. 43 (1985) (three years); Signal Ministries, Inc., 60 Rad. Reg.2d (P&F) 1700, 1711, n.16 (1986) (two years); Cuban-American Limited, 2 FCC Rcd. 3264, 3268 (1987)(two years). In the first remand decision, 7 FCC Rcd. at 4569 (n. 10), the FCC itself cites the case of Martin Intermart, Inc., 3 FCC Rcd. 1650, 1652 (¶7) (1988) in which the Review Board favored Applicant A for an open-ended integration commitment over Applicant B whose integration commitment was limited to only one year. This decision was handed down in March 1988. What the Commission doesn't tell the Court is that only three months later, in June 1988, Applicant A abandoned its integration commitment and dismissed its application in a settlement of the case in which Applicant B was awarded the permit in exchange for a payment to Applicant A in the amount of $750,000. Settlement agreement dated May 21, 1988 and unpublished FCC order

approving settlement dated June 16, 1988 in JA at 73-74.[10]

III. The FCC has failed to explain in any rational way its blind adherence to the "non-real-world" integration criterion while rejecting evidence of Mrs. Bechtel's "real-world" ownership and management proposal.

There must be two FCCs on M Street. In the Commission's rulemaking notice, it states:

> The 1965 Policy Statement presumed that an owner integrated into the day-to-day management of the station would "inherently" provide better service than a nonintegrated owner by linking legal responsibility and day-to-day performance and by being more sensitive to local community needs. 1 FCC2d at 395. While these assumptions are not unreasonable, current circumstances warrant inquiry as to their validity in practice. For example, the highly competitive nature of today's broadcast market and the professionalism of today's broadcast operations suggest that an integrated owner might not necessarily provide a more responsive service than would a nonintegrated owner. The court, in Bechtel, expressed a similar view: "The Commission has not spelled out why an owner/manager will be more sensitive to community needs than an owner who hires a professional manager." 7 FCC Rcd. at 2665 (¶14).

Amazingly, the FCC's contemporaneous second remand decision, 8 FCC Rcd. at 1676 (¶15), without equivocation, lists three reasons why the integration criterion is perfectly valid:

> First, the owners of an applicant proposing integration have demonstrated an active interest in the operation of the

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[10] This was at a time when parties to settlements were permitted to abandon their integration and divestiture commitments. The Commission has since adopted a rule that they are not supposed to do this when they settle a comparative hearing. 47 C.F.R. §73.1620(g); Proposals to Reform the Commission's Comparative Hearing Process to Expedite Resolution of Cases, 6 FCC Rcd. 157, 160 (1990), clarified, 6 FCC Rcd. 3403 (1991). However, in at least two recent settlements, the Commission has permitted the settling parties to do just that. See unpublished rulings by the Commission in comparative cases involving Gainesville, Texas (dated July 17, 1992) and Burlington, Vermont (dated November 17, 1992) in JA at 85-90, cited by the Review Board in Tracy A. Moore, FCC 93R-18, released May 19, 1993 at n. 18-20, in JA at 93-95 for handy reference.

> station that nonintegrated owners have not demonstrated. See Pilgrim Broadcasting Co., 14 FCC 1308, 1349 ¶15 (1950). Footnote.
>
> Footnote. We note, however, that in Pilgrim the Commission gave weight to indications of active interest other than integration. As explained in paragraph 17 below, we no longer do so.

The FCC does not cite any studies or empirical data for this proposition that integrated owners have demonstrated an active interest in the station which nonintegrated owners have not demonstrated. This is a notion which hard-driving CEO's of group owners or individuals who have invested a substantial portion of their life savings in a particular radio station would find totally wrong and unacceptable. The FCC cites only a single comparative hearing opinion, which was not based upon actual operating experience but rather on an assumption by the agency that was made more than 40 years ago, and, incredibly, an opinion that favored the applicant proposing the least amount of integration. All of which leads us eagerly to paragraph 17 of the second remand decision for the promised explanation of why the FCC no longer gives weight to active interests other than integration. Alas, paragraph 17 is silent on the matter. 7 FCC Rcd. at 1676. Next:

> Second, integrated owners, by virtue of their presence at the station, necessarily have been in a better position than absentee owners to become aware of specific requests, for example, from station visitors and correspondence, that the station's programming address community needs, and of the possibility that the station is not in compliance with Commission rules and policies.

For this point there is no citation whatsoever. Certainly there is no citation to a comparative study of how (a) integrated owners and (b) group or other non-integrated owners conduct themselves in

relation to visitors at the station, correspondence, or programs to serve community needs. This statement is based upon an assumption by the same agency that has written the contemporaneous rulemaking notice stating "an integrated owner might not necessarily provide a more responsive service than would a nonintegrated owner." Next:

> Third, integration has permitted those individuals with the most authority over, most direct financial interest in, and greatest legal accountability for the station to exercise day-to-day control and discretionary judgment at the station. See Homer Rodeheaver, 12 FCC 301, 307-08 (¶3) (1947).

No studies based upon real-life broadcasting operations and experience are cited. There is no comparative study of how (a) integrated owners and (b) group or other non-integrated owners bring their authority, financial interest and legal accountability to bear on the operation of the station including judgments made by the professional staff employed there. Again, the FCC cites only a single comparative hearing opinion handed down in 1947, which was not based upon actual operating experience, but rather on an assumption made by the agency almost a half century ago.

The FCC concludes this unsupported rhetoric with the equally unsupported idea, 8 FCC Rcd. 1676 (¶16), that the integration criterion provides a "structured" setting that is more "objective" than would be the case if it were to accept and consider other probative, relevant and material evidence addressed to the litigation issue of likelihood of effectuation of programming in the public interest -- not unlike trial judges and hearing officers who receive and consider probative, relevant and material evidence addressed to litigation issues in courts and hearing rooms

throughout the nation thousands of times every day.

The Commission's rigid adherence to its integration criterion because of its "structure" reminds one of the "Spruce Goose." For the benefit of the younger readers, this was an experimental airplane built by Howard Hughes, who started on the project during World War II and continued working on it for some 20 years using his own money after government funding ran out. Because of the wartime shortage of metal, the plane was made out of plywood, hence the name. Intended to transport large quantities of war material or as many as 800 fully-equipped troops at one time, the plane was enormous. Each wing was one hundred yards long. Counting the body of the plane, which itself was eight stories tall, the total wingspan was more than the length of two football fields. The plane had eight huge propeller-driven engines, all in a row. The "Spruce Goose" was, it must be said, a helluva structure. The problem is, it could never get off the ground.[11] Drosnin, Michael, Citizen Hughes, Holt, Rinehart and Winston (1985).

With all due respect, the integration criterion is the "Spruce Goose" of an "objective, structured" framework for administrative decision-making. For one thing, the rap on the integration criterion is that it is not objective. It calls for a bewildering array of subjective judgments based on minute distinctions, as the

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[11] More accurately, off the water. The Spruce Goose was to be a seaplane. Still more accurately, the Spruce Goose did actually fly on one occasion, piloted by Mr. Hughes himself (shortly before he went into seclusion), reaching an altitude of 70 feet for a one mile trip in Long Beach Harbor. Drosnin, Michael, Citizen Hughes, Holt, Rinehart and Winston (1985), at 48.

reader of the decisions in the KIST, Victory Media, Coast TV, Royce and Evergreen cases will surely attest. If the FCC is looking for a structure with objectivity, the last place it should look is the integration criterion.

But there is an even more basic flaw in the structure of the integration criterion which no amount of rhetoric can dispell: The FCC penalizes an existing broadcaster in the comparative process. He or she receives limited (almost never decisional) credit for having broadcast experience and receives a demerit (usually fatal) for retaining any other broadcast interests. Accordingly, few veteran, professional broadcasters participate in the comparative hearing process. Most applicants who do participate in the process are not veteran, professional broadcasters having credentials that qualify them to be the managers of their stations. Most are newcomers to the business. But, in order to win the comparative hearing under the integration criterion, they must propose to be the managers of their stations. Full time, on-site, 40-hour-a-week managers. The top managers, not in a subordinate role. The system thus is designed to produce a permittee who doesn't know how to build and run the station when he or she gets it.

The FCC's answer has always been, these newcomers can learn the business. Maybe at one time that was true. We doubt it, and certainly have never seen a Commission study that proved it. But in today's highly competitive communications world, if a newcomer tries to truly run his or her own station in the manner claimed at the FCC hearing -- whether in Atlanta or Dallas-Fort Worth or

Selbyville, Maryland located in the tough Salisbury-Ocean City market which has experienced more than one radio station bankruptcy in recent years -- the already established and professional competitors in the marketplace will eat his or her lunch. The integration criterion is a regulatory structure that is designed, indeed almost guaranteed, to produce station ownership and management scenarios that will almost never get off the ground -- that will almost never work in the real world of broadcasting. This is why the FCC doesn't have any studies of its ownership records to produce. This is why to date not a single "integration success story" has ever surfaced. There is virtually no genuine or lasting impact on the public interest from this licensing process. The hearing promises of the integrated owners are a mirage that disappears when reality is at hand.

There can be exceptions to this indictment of the integration criterion in those rare instances when the comparative hearing process awards a permit to a veteran broadcaster who does know what to do with the permit when he or she gets it and who has access to the financial resources to build the station, place it on the air, "turn the corner" in the market, and establish a viable station for operating at a profit and in the public interest over the long haul. See, Channel 32 Broadcasting Company, 5 FCC Rcd. 7373 (1990), recon. denied, 6 FCC Rcd. 872 (1991), review denied, 6 FCC Rcd. 5188 (1991), recon. denied, 7 FCC Rcd. 1694 (1992), affirmed without published opinion, sub nom. Kansas City TV 62 Limited Partnership, No. 91-1491 and consolidated cases, judgment filed May

10, 1993, JA 91-92. (integrated owners are two life-long communications executives, responsible for securing the bank and equipment financial commitments for the station, one of whom has a career in management of television stations including successful construction and inauguration of new UHF television operations similar to that applied for, both having full power to manage the station for the first seven years of operation before debentures could be converted into stock that would dilute their equity from 100% to 50%).[12]

But, as we have said, that is a rare circumstance under the integration criterion and related policies that discourage professional broadcasters from applying for new station permits. If the Commission in its wisdom were to modify its criterion in the current rulemaking proceeding to reward the real-world filing of applications by competent professionals rather than opportunistic newcomers, the public interest would benefit enormously. If the Commission has to have structure, then that can be established to deal with real-world broadcaster applications no less than for applications by newcomers. A government agency that can structure the integration criterion can structure anything. Bureauracy will set in, of course, but at least the regulatory effort will be

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[12] The prevailing applicant in this case has been represented by the firm, Bechtel & Cole, Chartered, and the undersigned Gene A. Bechtel has an interest in a debenture convertible into a 20% equity interest. That debenture is a fee for services rendered in securing the construction permit, not as a financial investor in the venture. By written agreement, when the permit is issued, which is expected shortly, this law firm will resign and will be replaced by new and independent communications counsel for the permittee.

addressed to the real world of broadcasting, not the Alice-in-Wonderland world of the current licensing scheme.

Which does not settle the instant litigation. The FCC's current rulemaking by its terms will not apply to the application of Mrs. Bechtel. 7 FCC Rcd. at 2669 (¶41). Nor does it appear that the FCC could lawfully apply the new rules to Mrs. Bechtel's application if it wanted to. Bowen v. Georgetown University Hospital, 109 S.Ct. 468 (1988). In the instant litigation, this Court must deal (and ultimately, we believe, the FCC upon further remand must deal) with an adjudication in which (a) the integration criterion has been shown to be unreasoned, arbitrary and capricious and (b) the Commission's rejection of competent and material evidence relevant to the litigation issue of likelihood of effectuation of program service in the public interest has likewise been shown to be unreasoned, arbitrary and capricious. Mrs. Bechtel is entitled to a decision that grants her the fruits of her labour to challenge the process and litigate the matter to a decision of unlawfulness; otherwise that adjudicated decision would be dicta to Mrs. Bechtel in this very case, and other citizens having the will to litigate apparent unlawful conduct by government agencies would be discouraged from doing so to the detriment of all of the public. James B. Beam Distilling Co. v. Georgia, 111 S.Ct. 2439 (1991); Stovall v. Denno, 388 U.S. 293 (1967).

CONCLUSION

For the foregoing reasons, the first and second remand

decisions of the FCC should be reversed and remanded to the Commission for a comparison of the ownership-management proposals of both Anchor and Mrs. Bechtel, as well as other comparative factors such as comparative coverage, without any advantage to Anchor for its purported compliance with the unreasoned, arbitrary and capricious integration criterion or any disadvantage to Mrs. Bechtel for her submission of proposals that do not comply with the integration criterion.

Respecfully submitted,

Gene A. Bechtel

Harry F. Cole

Bechtel & Cole, Chartered
1901 L Street, N.W.
Suite 250
Washington, D.C. 20036
Telephone: 202-833-4190
Telecopier: 202-833-3084

Counsel for Susan M. Bechtel

August 30, 1993

THIS CASE HAS BEEN SCHEDULED FOR
ORAL ARGUMENT ON OCTOBER 14, 1993.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Case No. 92-1378

SUSAN M. BECHTEL,
Appellant,
v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee,

ANCHOR BROADCASTING LIMITED PARTNERSHIP,
Intervenor.

On Appeal of Orders of the
Federal Communications Commission

REPLY BRIEF OF APPELLANT SUSAN M. BECHTEL

GENE A. BECHTEL
HARRY F. COLE

Bechtel & Cole, Chartered
1901 L Street, N.W. - Suite 250
Washington, D.C. 20036
(202) 833-4190

Counsel for Susan M. Bechtel

Initial reply brief filed: August 12, 1993
Final reply brief filed: August 30, 1993

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REPLY BRIEF OF SUSAN M. BECHTEL

The brief of the Federal Communications Commission (FCC or Commission) fails to address many of the points made in our opening brief, on which we rely without repetition here. Our reply addresses the FCC brief relative to: (I) the comparative coverage factor and (II) the integration factor.

I.
The Comparative Coverage Factor

Mrs. Bechtel will serve 21% greater population than Anchor. None of the three comparative coverage cases cited in the FCC's brief at 3 n. 1 and 15 n. 4, Capital City Community Interests, Inc., 2 FCC Rcd. 1984 (Rev.Bd. 1987), Resort Broadcasting Co., Inc., 41 FCC2d 640 (Rev.Bd. 1973) and William L. Carroll, 8 FCC Rcd. 814 (1993), involves the issue raised in this case, that the ephemeral period of initial ownership of a broadcast station, selected under the flawed integration factor, with the total erosion of any notion of "permanent" initial ownership, is vastly outweighed as a public interest factor by the lasting impact of a technical facility which provides greater coverage, in furtherance of the regulatory program to deploy the spectrum to provide broadcasting services to the nation's people which has been a highly successful program, in bright contrast to the dreary "integration" effort, dating back to the passage of the Communications Act itself. 47 U.S.C. §307(b); FCC v. Allentown Broadcasting Corp., 349 U.S. 358 (1955). By way of illustration, the initial allocation of 630 kilocyles on the AM band to what is now radio station WMAL in 1925 has given the service area of that station the opportunity to receive such service for the past

approximately 68 years, irrespective of the ownership, management or program format that may have been in place at any point in time. If the government in 1925 had favored one applicant over another because of a 21% differential in population served, this would have yielded a public interest legacy of 21% greater coverage of the listening public lasting 68 years to date, and still counting. So, too, here. A grant of the application of Mrs. Bechtel will be a permanent legacy that will long outlast the initial ownership of the Selbyville facility, particularly an initial ownership founded on the quicksand of FCC-sponsored "integration" ownership.

The FCC upon remand has made no effort to deal with this issue.

II.
The Integration Factor

> They sailed away, for a year and a day,
> To the land where the bong-tree grows;
> And there in a wood a Piggy-wig stood,
> With a ring at the end of his nose...
> And hand in hand, on the edge of the sand,
> They danced by the light of the moon.
>
> The Owl and the Pussycat
> Edward Lear

The FCC's integration factor is little more than a fairy tale, a nursery game in which the players supposedly agree, with winks and nods all around, to dance together for at least a year and a day. But the FCC, the beneficent babysitter who sets the rules, has never bothered to enforce them, or to inquire whether they make any sense.

Vacillation and instability by the FCC. Since Mrs. Bechtel

first challenged the integration factor, the FCC has had multiple opportunities to defend, or at least shore up, its policy. Oddly, the FCC has instead underscored the validity of Mrs. Bechtel's observations: in the last two years the FCC has careened wildly from conclusory restatements of its policy (without serious factual or legal rationale) to strong suggestions that the policy is without merit and back again to conclusory restatements and back again to criticisms, creating the impression of an agency arguing with itself. (a) Prior to this Court's decision in Bechtel v. FCC, 957 F.2d 873 (January 1992), the FCC refused to consider Mrs. Bechtel's argument that the integration factor has become fatally flawed. (b) Following that decision, the FCC issued a rulemaking notice (NPRM) (April 1992), JA 75-84, expressing strong criticism of the integration factor and proposing modification, or even elimination, of it. (c) Then, the FCC issued its remand decision in the Bechtel case (July 1992) in which it highly acclaimed the integration factor citing in support, inter alia, the same cases it had cited in support of its criticism in the NPRM. (d) Then, this Court rendered its decision in another case, Flagstaff Broadcasting Foundation v. FCC, 979 F.2d 1566 (December 1992), in which it suggested that the FCC remand decision in the Bechtel case was no more than a summary dismissal of Mrs. Bechtel's arguments. (e) Then, the FCC issued its second remand decision in the Bechtel case (March 1993) providing, in our view, little more than added window dressing to its first remand decision and ignoring its contrary position in the NPRM. (f) Then, following the filing of

our opening brief in the instant appeal, the FCC filed its responsive brief (July 14, 1993). (g) Throughout this process, the FCC staunchly defended its rule that parties who secure a permit based upon their integration commitment must construct and operate the station fulfilling that commitment for one year, and thereafter are free to dispose of the station to the highest bidder.[1] (h) For more than a year, the FCC has sat on the rulemaking proceeding without taking definitive action to modify or abolish the integration factor. (i) Now, two weeks after filing its brief here, asserting, at 18-19, the latest staunch defense of the one-year holding period, the FCC (on July 30th) issued a news release announcing yet another rulemaking proceeding proposing a three-year holding period for parties who secure a new station permit in the comparative process. JA 447-48. Given this vacillation and instability on the part of the FCC, the mere pendency of, now, two rulemaking proceedings at that agency does not assuage the concerns of this Court in Bechtel v. FCC.

So-called vigorous enforcement of integration promises. The

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[1] Under such policy, the station owner would literally be free to file an application to sell the station "A year and a day" after commencement of operation, upon the filing of a certificate that he or she has fulfilled his or her integration commitment. In our opening brief, we cited a case where the transfer application was indeed filed within a few days of the end of the first year. Cleveland Television Corporation v. FCC, 732 F.2d 962 (D.C.Cir. 1984). The FCC's brief does not respond to this. We also cited a case where the agreement to sell the station was signed five months into the first year, and was filed then with the FCC, and still the FCC did nothing. Bernstein/Rein Advertising, Inc. v. FCC, (Debra D. Carrigan), 830 F.2d 1188 (D.C.Cir. 1987). The explanation of its failure to take any action, in the FCC's brief at 20-21, is gibberish.

FCC brief, at 16-17, gives two examples of vigorous enforcement of integration promises, taken from its records of implementation of a policy that has been in existence for 28 years and involves an integration factor which has been employed in adjudications by the agency for nearly a half century. One example, Mid-Ohio Communications, Inc., 5 FCC Rcd 940, recon. denied, 5 FCC Rcd 4596 (1990), aff'd, 946 F.2d 1565 (D.C.Cir.)(table), cert. denied, 112 S.Ct. 415 (1991), was a comparative hearing involving a license renewal application and a challenging application, with the rare occurrence of the incumbent renewal applicant claiming credit for integration while actually operating the station, thus giving its opponent an opportunity to challenge that claim based on evidence that the putative integrated party spent most of his time running a car dealership 100 miles away. Given those blatant circumstances, the FCC denied the renewal for misrepresentation. This also should have told the agency something about the "predictive value" of its integration policy.[2] The other example, Richard Bott II, FCC 93-290,

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[2] Elsewhere in its brief, at 24-25, the FCC cites three cases in which license renewals were denied because the licensee did not maintain adequate control over its station. Two of those cases involved on-site ownership-management. Trustees of the University of Pennsylvania, 69 FCC2d 1394, 1396 (1978) involved a noncommercial FM station on the campus of the university that was virtually abandoned to the students without oversight by the trustees and faculty responsible for the station. Cosmopolitan Broadcasting Corp. v. FCC, 581 F.2d 917 (D.C.Cir. 1978) involved irresponsible delegation of control to "time brokers" of foreign language programs by a licensee whose majority owner was on site as the top management staff person at the station. See findings of the Commission below, Cosmopolitan Broadcasting Corp., 37 Rad.Reg.2d (P&F) 569, 574 n. 4 (1976). The third case, Continental Broadcasting, Inc. v. FCC, 439 F.2d 580 (D.C.Cir.), cert. denied, 403 U.S. 905 (1971), involved a group owner.

released June 15, 1993 (contemporaneously with the preparation of the FCC's brief in this appeal) designated for hearing an application to transfer the construction permit for an unbuilt station where the permit had been secured based upon an integration commitment, distinguishing earlier cases in which the FCC had allowed CP transfers in such situations on the theory that its rule concerning transfers of permits for unbuilt stations was not impacted by the one-year holding requirement for parties winning permits based upon integration commitments.

It is telling that, in support of a policy which has been in place for at least 28 years (and, in one form or another, has been used for almost 50 years), the FCC has offered up only two illustrations of its supposedly vigorous enforcement of the policy. It seems particularly telling that one of those cases just happens to have been issued two weeks after the filing of Mrs. Bechtel's initial brief in this appeal. But even if those cases might arguably be thought to somehow reflect a program of agency enforcement of its integration policy (which we doubt), such a view must be tempered by examples of apathy (or worse) toward that very policy.

In our opening brief, at 40 n. 10, we referred to unpublished rulings involving Gainesville, Texas, and Burlington, Vermont, cited by the FCC's Review Board in Tracy A. Moore, FCC 93R-18, released May 19, 1993. The Gainesville, Texas, case involved two competing applicants for a new FM station, both of whom proposed integration. On July 9, 1992 the Commission released a published decision upholding the award by the Review

Board and the ALJ of the permit to one Kevin Potter and denying the application of one Mark Rodriguez, Jr. primarily on the ground that Mr. Potter's full time integration was superior to Mr. Rodriguez' part time integration. Kevin Potter, 7 FCC Rcd. 4342. Eleven days later, on July 20, 1992, in an unpublished opinion, JA 85-87, the Commission approved a settlement of the case (pursuant to which Messrs. Potter and Rodriguez merged their interests in a joint venture) and relieved both individuals from their integration commitments even though the FCC had previously adopted a rule that parties to settlements must carry out their integration commitments. Comparative Hearing Reform, 6 FCC Rcd. 157, 160 ¶21, 6 FCC Rcd. 3403 ¶6 (1991).[3] It is of course bad enough that the FCC ostensibly supported the integration factor in a published opinion but quietly trashed that same factor in an unpublished opinion less than two weeks later. But what is truly stunning is that, at the time it issued the published opinion, the FCC had before it the settlement proposal which it approved in the unpublished opinion -- including the proposal that the parties' integration proposals be abandoned. See JA 337-51 (settlement proposal filed May 22, 1992), and 7 FCC Rcd. 4342 (published opinion adopted June 25, 1992, released July 9, 1992).

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[3] The unpublished opinion, JA 85-87, gives no reason for excusing Mr. Potter from his integration commitment. Rather, it relies on a strange interpretation of the fine print of the rule, i.e., that only "successful applicants" who are parties to settlements must adhere to their integration commitments, and since the two applicants had merged into a new joint venture neither Mr. Potter nor Mr. Rodriguez was a "successful applicant." Since they both jointly succeeded in securing the permit, in our view, the FCC's gloss makes no sense.

In other words, when it adopted and released the published opinion, the FCC knew that the parties were seeking to avoid their integration proposals. The Court will search the published opinion in vain for any indication that this was the case.

The Burlington, Vermont, case involved six applicants for a new television station in which the winner had been selected by the Review Board based upon its superior integration commitment. WCVQ, Inc., 7 FCC Rcd. 4849. This was in July 1992. Four months later, in November 1992, the Commission rendered an unpublished opinion approving a settlement in which five of the parties including the winning party merged their interests in a joint venture, and excused all of the parties including the winning applicant from their integration commitments. JA 88-90.[4] Maybe this is valid administrative law. We doubt it. But for sure, this agency has displayed no real interest in or or zeal for implementing a viable, long-range, monitored, effective, regulatory program of local ownership-management-integration.

Claimed rejection of proposals that abuse the integration process. On occasion, the Commission does reject a proposal that abuses the integration process, FCC brief at 25-26. In Evergreen Broadcasting Co., 6 FCC Rcd. 5599, 5600-01 ¶12 (1991), the Commission rejected three of ten applicants for having meritless integration schemes. In Garden State Broadcasting Limited Partnership v. FCC, No. 91-1043 (D.C.Cir. June 29, 1993), the

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[4] Again on the strange theory that none of these parties who had jointly succeeded in securing the construction permit was a "successful applicant."

Commission denied a party's effort to settle one case for a $2 million payment on the heels of another related party having successfully settled a previous case involving the same station for a $5 million payment. The problem, as the FCC recognized in its April 1992 NRPM but refused to recognize in its two remand decisions or its brief here, is that the integration policy is designed to invite the filing of abusive or incredible integration scenarios, i.e., one party is to put up all of the money with no strings attached and another party, who has never run a radio or television station before, is going to build and operate the station with the first party's money absolutely free of controls and restraints. The problem, as the FCC recognized in its April 1992 NRPM but refused to recognize in its two remand decisions or its brief here, also is that the myriad of factual mosaics which naturally emanate under the integration factor are so subjective and the standards are so vague that decision-making is a legal no-man's land. We detailed evidence of this in our opening brief, at 22-25, including a discussion of the Evergreen case and a series of other integration cases, at 29-33, concerning which the FCC brief is silent.

Still no integration success story. Much of the FCC brief is devoted to citations to the proposition that it has wide latitude for exercising judgment in adopting policies in the communications field. This argument is written as though we are challenging some freshly-made recent policy decision for which the FCC has drawn on its regulatory experience to "guesstimate" how things will work out in the future. But that is not our